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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 597

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, ET AL.,
Respondents.

BRIEF OF RESPONDENT SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 597

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, ET AL.,
Respondents.

No. 45,065 IN THE SUPREME COURT OF MISSISSIPPI

BRIEF OF RESPONDENT SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

I. THE RECORD

At the instance of petitioners the Clerk of the Supreme Court of Mississippi did not certify to this Court the entire record of proceedings in that Court but parts thereof were omitted.

At the instance of respondent additional parts of the record in the Supreme Court of Mississippi are being certified to this Court to be on file when this brief is filed.

That part of the record in the Supreme Court of Mississippi contained in bound volumes is in eighteen (18) volumes numbered with Roman numerals. In keeping with rules of this Court and for convenience that part of the record will be cited by volume and page, thus: "R. I, 1", meaning "Record, Volume I, Page 1", etc.

II. APPENDICES

Appendices to the petition herein include copies of documents which are appropriately before the Court in this form and will not be duplicated in this brief. They will be referred to herein where appropriate. For convenience the reference will be to: "Pet. A. 1, P. 19", meaning "Petitioners' Appendix No. 1, Page 19 of Petition", etc.

Copies of additional documents are made appendices to this brief for reasons which will hereinafter appear as follows:

Appendix 1: "Electric Power Association Act" of Mississippi (Chapter 184, Mississippi Laws of 1936, as Amended; Section 5463, et seq., Volume 4A, Recompiled, Mississippi Code of 1942)

Appendix 2: Sections 26 and 27, Chapter 372, Mississippi Laws of 1956 (Sections 7716-26 and 7716-27, Volume 6, Recompiled, Mississippi Code of 1942)

Pages of the appendices hereto will be numbered serially beginning with page "A1".

III. STATEMENT OF THE CASE

On March 31, 1960, South Mississippi Electric Power Association, a respondent herein (called respondent), filed its petition before the Mississippi Public Service Commission (called Commission) for a Certificate of Public Convenience and Necessity authorizing it to construct and operate an electric generating and transmission system consisting of a steam electric generating station to be located at Mozelle in Jones County, Mississippi, and transmission lines radiating therefrom into seventeen (17) counties in Eastern and Southeastern parts of the State for the purpose of providing a wholesale supply of electricity to four (4) of its corporate members (themselves electric power associations engaged in the distribution and sale of electricity to the public at the retail level).

The petition was protested by Mississippi Power Company and Mississippi Power & Light Company (called petitioners).

On March 7, 1963, after extended hearings the Commission entered its final order in that cause (Docket No. U-508) granting unto respondent the Certificate as prayed for. Petitioners appealed to the Chancery Court of the First Judicial District of Hinds County, Mississippi (the intermediate court of appeals in such cases), where the order was affirmed by final decree entered January 22, 1965; thereupon petitioners appealed to the Supreme Court of the State where the order was again affirmed by opinion and judgment entered February 14, 1966 (Pet. A. 7, P. 96, et seq.).

Due to extended hearings before the Commission and an abortive "appeal" taken by petitioners at an early stage in that proceeding, first to the Chancery Court, then to

the Supreme Court of the State, as well as delays incident to the appeal by petitioners from the final order of March 7, 1963, aforesaid (record on that appeal contained more than 12,000 pages in 82 volumes) there was a lapse of six (6) years (lacking ten days) from the time the petition was filed before the Commission, March 31, 1960, and the time when the State Supreme Court's affirmance became effective (following denial of petitions for rehearing) March 21, 1966—three (3) years and fourteen (14) days from the date of the order.

During this period respondent was prevented from commencing construction of its system because when petitioners took their appeal from the Commission's final order aforesaid they petitioned for, posted security and obtained a "stay order" (as they had a statutory right to do) which operated in like manner as a supersedeas (A. ~~19-20~~ 20-22).

Meantime, the load which respondent had been authorized to serve was growing. On July 20, 1965, while the appeal to the State Supreme Court was still pending respondent filed with the Commission a petition for an amendment to its Certificate permitting increases in the capacity of its system to keep up with the growing load. After the appeal finally failed, as aforesaid, the Commission heard the petition for amendment (petitioners protested that petition also) and granted the amendment by order entered January 4, 1967 (Pet. A. 1, P. 19, et seq.).

From that order petitioners appealed to the Chancery Court where the order was by decree entered on December 22, 1967, affirmed in part and reversed in part, and the cause was remanded to the Commission for further proceedings (Pet. A. 2 ~~and 3,~~ PP. 68-72).

From this decree respondent appealed to the State Supreme Court where on June 10, 1968, the decree inso-

far as it reversed the order of the Commission was reversed and the order of the Commission was reinstated in its entirety (Pet. A. 3, P. 73, et seq.). Petitions for rehearing were denied July 8, 1968 (Pet. A. 4, P. 83).

Pending the appeal respondent filed a petition before the Chief Justice of the State Supreme Court for a Writ of Supersedeas averring that after expiration of the stay order aforesaid (on March 21, 1966) and entry of the Commission's order of January 4, 1967, amending the Certificate, respondent had commenced construction of its system; that the construction program was well advanced (over $10 million thereof being already under firm contracts); that it would be in the public interest as well as that of respondent for the construction program to proceed normally, pending the appeal, etc. The application was supported by numerous exhibits attached. The Chief Justice, although having statutory authority to act alone, elected to refer the application to the Court en banc and on February 8, 1968, the Court en banc entered its order granting supersedeas. Thus construction was not and has not been interrupted. See parts of record sent up with "Supplemental Certificate of Clerk of Supreme Court of Mississippi" dated October 29, 1968.

Petitioners in due course following denial of their petitions for rehearing by the State Supreme Court on July 8, 1968, filed the petition for a writ of certiorari which is now before this Court

IV. PETITIONERS' STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate and misleading in the following respects:

(a) It asserts that respondent's petition to the Commission for an amendment of its Certificate was for "a different system in lieu of that specified in the 1963 Cer-

tificate" (Pet., 4); whereas, the petition for amendment was merely for adding capacity by means of certain modifications and additions to facilities in order to take care of normal load growth occurring during the time respondent was prevented from commencing construction by the stay order issued at the instance of petitioners.

(b) It asserts that "No construction has been undertaken pursuant to the original Certificate." (Pet., 4-5); whereas, construction was well advanced under that Certificate as amended at the time of the appeal by respondent from the Chancery Court's decree of December 22, 1967, as is fully shown hereinabove.

(c) It implies that the Commission received evidence offered by respondent tending to show that respondent should be permitted to enter the field of generation and transmission upon the basis of public convenience and necessity as opposed to the four (4) corporate members of respondent continuing to purchase power from petitioners (Pet., 6-7) (note particularly on Page 6 "At the hearing, respondent was permitted to introduce, and the Commission received, all the evidence it offered, including testimony with respect to the cost of the project and economics of operation."); whereas, nothing could be further from the truth. The evidence offered by respondent and received was on the proposition that in view of the delay in construction (which was caused not by respondent but by the stay order obtained by petitioners) and the load growth which had occurred and was normal, increased capacity was imperative and it could be more economically and efficiently provided by modifying construction in certain particulars, including the use of larger generating units, as initial construction, rather than building as originally certificated and adding on. The very record citations given by petitioners on page 6 will plainly show that this is true.

(d) The implication goes further (Pet., 6-7) and suggests that petitioners were denied the privilege of introducing evidence on issues on which evidence had been received from respondent. This implication is completely untrue. Respondent's evidence was limited to what would be the most economical and efficient means of providing increased capacity in the system and petitioners offered no evidence whatever on this proposition (Pet. A. 1, PP. 37-41—Commission's Order of January 4, 1967; Pet. A. 3, PP. 77-78—Opinion of State Supreme Court of June 10, 1968).

(e) Petitioners' Statement of the Case is moreover fatally defective in that with respect to the alleged federal questions relied upon it fails to meet the requirements of Supreme Court Rule 23-(f) in these particulars: (1) it does not specify "the way in which they were passed upon by the Court"; and (2) it does not set out "pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears. . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

V. ARGUMENT

(a) Two Theories of the Case

The only question presented by the petition is whether in the hearing before the Commission the petitioners (as protestants) were denied a fair hearing meeting requirements of the Fourteenth Amendment to the Federal Constitution on issues presented by the petition which was before the Commission. Petitioners claim they were denied such a hearing because the Commission excluded certain evidence offered by them as being irrelevant and limited cross-examination at certain points on the same basis. In order to answer the question as to whether there was a fair

hearing the issue or issues presented by the petition before the Commission must be identified. That petition is found in Volumes II, III, and IV at Pages 7-90 of the Record, to which the Court's attention is respectfully invited.

Respondent and petitioners held diverse views as to the issues presented by that petition as follows:

(1) Respondent's view, which was shared by the Commission and the State Supreme Court, was that the Commission should not and could not try over again the issues which had been settled in its order of March 7, 1963 (whether there was an adequacy of generation and transmission facilities in the state; comparison of power costs; comparisons of quality of service; adequacy of proposed facilities for purposes intended; grandfather rights; whether wholesaler should build transmission lines to load centers of purchasing retailers; whether when all things are considered the public convenience and necessity required or would require that the loads involved should be allocated to respondent, etc.), which order had been finally approved and affirmed by the State Supreme Court; that those issues had already been fully heard and settled by said order of March 7, 1963; that the purpose of the petition then before the Commission was simply to provide increased capacity in the system to handle load growth occurring during delay in construction caused by litigation and a stay order (load growth being normal), the increase to be by means of additions to and modifications of facilities; and the scope of the evidence should not therefore include a retrial of the original proceeding (which incidentally required 78 days of hearing time and produced a record of some 12,500 pages in 82 volumes) under which the loads involved had been allocated and certificated to respondent; and

(2) On the other hand, the view of the protesting power companies, petitioners here, was that inasmuch as

respondent had not actually constructed its system (regardless of the reason for the delay) it could not be authorized by certificate amendment to increase the capacity thereof by means of modifications and additions to meet load growth; that this amounted to abandonment of the originally certificated system and the petition before the Commission had to be regarded as a new start as if the order of March 7, 1963, had never been issued; wherefore all of the issues with respect to public convenience and necessity which had been adjudicated in the order of March 7, 1963, had to be litigated and adjudicated all over again.

This basic difference of opinion as to the nature of the matter before the Commission accounted for all of the rulings about which petitioners (as protestants) complained before the Commission and the courts below; and now complain in their petition to this Court for a writ of certiorari.

(b) Exclusion of Evidence Offered by Petitioners (As Protestants)

Under respondent's theory of the case the "issues" before the Commission were: whether the loads of respondent had grown during the time it was prevented from commencing construction by the appeals and stay order; if so, how much; what were the forecasts of further growth during the next several years; and what would be the best means of increasing capacity to take care of load growth? And petitioners (as protestants) offered *no evidence* on these issues. They clung tenaciously to their thesis that because respondent had to have increased capacity (albeit the delay was brought about by petitioners themselves!) it had thereby "abandoned" its certificated generation and transmission system, was out of the field entirely and was seeking authority to enter the field with "another and different" system.

The Commission made findings on the point as follows:

> 23. Protestants made no serious effort to show that it would be in the public interest for Petitioner to build its system as originally certificated and add onto it rather than building the modified system with increased capacity as sought by the Petition. Rather Protestants seemed to advance the theory that since Petitioner is seeking permission to increase the capacity of its system in the manner set forth in the Petition, it has "abandoned" its original system, now proposes to build a "different" system, and it is therefore required to again prove public convenience and necessity for entering the generation and transmission field; and under this theory Protestants sought to bring up and litigate all over again the basic issues involved in the original proceeding.
>
> 24. In the opinion of the Commission, those issues have been heretofore fully litigated and decided in favor of Petitioner and against Protestants; and that determination has been affirmed by the highest Court of our State. For all purposes of this proceeding, Petitioner is in the opinion of the Commission already in business in the generation and transmission field. If this view were not adopted, it would be easy to see how a Petitioner might file its petition, prove its case, be awarded a certificate to enter the field, be carried up on appeals by Protestants, win in the courts, find that its loads had increased in the interim; start all over again by petition to modify its facilities to provide for the increased loads (the Commission judicially knows loads have been for a long time increasing at the rate which doubles them at intervals of from seven to ten years) only to be met again by Protestants (who may have, in the meantime, mended their ways and better prepared themselves to protest) and if fortunate enough to win again, again start the journey on appeals; and so on *ad infinitum*; so that even the most deserving Petitioner, under the most impelling circumstances insofar as the public interest is concerned,

> might find itself continually applying for certificates but never able to enter the field. This sort of situation could approach the making of some utilities "captive customers" of others, a thing frowned upon by our Supreme Court in this very case (*Mississippi Power Company, et al.* v. *South Mississippi Electric Power Association, et al.*, 183 So. 2d 163, 170); and certainly such a situation would, for obvious reasons (suppression of competition, protracted litigation, unnecessary expense, etc.) be inimicable to the public interest.

The parties were before the Commission on two different cases, so to speak. Respondent was there on a petition to increase capacity to meet load growth; petitioners as protestants were there to contend that the original case should be tried all over again.

All testimony and exhibits, the exclusion of which is assigned as grounds for issuance of the writ of certiorari (Pet., 6-7) were on the question of *whether* respondent should enter the field of generation and transmission in the state; *none* on the question of whether respondent needed increased capacity in its system to handle normal load growth occurring while it was under a stay order and, if so, the best means of providing the increased capacity.

The State Supreme Court in its opinion (*South Mississippi Electric Power Association* v. *Mississippi Public Service Commission, et al.*, 211 So. 2d 827 (1968); Pet. A. 3, P. 73, et seq.) after the most careful consideration readily followed and adopted the views of the Commission on the scope of the issues involved, quoting with approval the above quoted paragraphs 23 and 24 of the Commission's order. The Court said inter alia (211 So. 2d at P. 829, et seq.):

> Appellees protested the granting of the amended certificate and contended among other things that the facilities and generating plant described in the petition

to amend was not a modification of the facilities and plant authorized by the order of March 7, 1963, but instead was a new and different plant and that it was in effect an original application and an abandonment of the certificate granted. As a consequence thereof appellees argue that appellant was required by the Public Utility Act of 1956 to prove, as it did in the original petition, that public convenience and necessity require construction of any facilities by appellant. Singing River, Dixie, Southern Pine and Pearl River Valley electric power associations filed a petition to intervene and they were allowed to do so. They joined in the request that the amended application be granted. The commission confined the issue to be tried on the amended application to the question of whether public convenience and necessity required the construction of the enlarged system rather than the system originally authorized. It rejected the evidence offered by appellees designed to show that public convenience and necessity did not require the construction of any facilities by the appellant. It also refused to allow appellees to cross-examine appellant's witnesses on this issue. The commission held that the testimony offered was immaterial to the issue before it at that time. Appellees were allowed to proffer the evidence rejected and it is in the record before us. The hearing was extended over a period of several weeks and resulted in a rather lengthy record, which we have carefully reviewed.

On January 4, 1967, the commission entered an order sustaining the petition and granted an amended certificate authorizing appellant to construct the enlarged system. The order of the commission deals with all the questions involved in this appeal but due to its length we will only set out herein such portions as we deem appropriate.

The commission found from the evidence that:

31. From all of the evidence, the commission is of the opinion and finds that the granting of an order herein amending the certificate of public con-

venience and necessity heretofore granted to Petitioner by the Order of March 7, 1963, in manner and form as sought by the Petition to Amend would materially benefit the Petitioner, the four corporate members of Petitioner to be supplied with power at wholesale by Petitioner and that segment of the public served by said corporate members of Petitioner; this would be particularly true in that Petitioner would thereby be enabled to build its system up to the capacity presently required in a more orderly way with a substantially smaller capital investment and would obtain a more efficient operation than would be the case if it approached the problem by building the system as originally certificated and making additions thereto.

32. On the whole record therein, the Commission is of the opinion and finds that the Petitioner has sustained its Petition to Amend its certificate of public convenience and necessity heretofore granted on March 7, 1963, by the evidence and that the public convenience and necessity require and will require that the Commission issue an order herein amending said certificate of public convenience and necessity in manner and form as sought and prayed for in the Petition to Amend, as amended.

Appellees appealed to the Chancery Court of the First Judicial District of Hinds County. The chancellor, after reviewing the record, wrote a memorandum opinion wherein he concurred with the commission in its finding that the order as affirmed in *Mississippi Power Company*, supra, was res judicata in this cause. He also concurred with the commission in its finding that the delay of the appellant in constructing the authorized generating plant and transmission lines was through no fault of appellant, but was solely caused by appellee's appeal. The chancellor then stated:

It is my opinion that the issue for trial before the Commission on this second petition was whether public necessity and convenience required the increased facilities or any part thereof, due to increased needs and demands, if any, and increased or decreased supply, if any, occurring since the order on the original petition.

The Commission proceeded to try the issue, but it is my humble judgment that the Commission committed reversible error when it refused to permit the respondents to cross-examine petitioner's witnesses and refused to permit the respondents' witnesses to testify in defense of the issue and refused to receive in evidence the exhibits offered in defense of the issue.

Therefore the order of the Commission is affirmed as to continuing the order on the original petition in full force and effect, but it is reversed and remanded to the Commission for a new trial on the issue of whether or not public necessity and convenience requires the enlargement of the generating plant and transmission lines as prayed for by the petitioners, and to hear all competent evidence offered by both sides or parties to determine the issue. That is to say, follow the same procedure and rules of evidence they followed on a hearing of the first or original petition on its merits, and in accordance with our Supreme Court's opinion affirming the original order, supra, and this opinion.

I hold as a matter of law that the respondents may offer evidence that the original facilities with the enlargement thereof are not a public necessity and convenience to show that the enlargement of the facilities is not a public necessity or convenience, but no further, as they cannot attack the facilities as first authorized.

A decree was entered in accordance with the chancellor's opinion and from that decree this appeal is prosecuted. There is no cross-appeal.

The principal question for determination is whether the chancellor was correct in holding that the commission was in error in rejecting the testimony offered by appellees and in limiting the cross-examination of appellant's witnesses.

A determination of this question depends upon the scope of the issue to be tried by the commission on hearing the petition for an amended certificate. Appellant urges that the only issue to be tried by the commission was whether public convenience and necessity required the construction of the enlarged system instead of the facilities authorized in the original certificate. It is their contention that the commission properly limited the testimony to this issue and that the testimony offered by appellees was incompetent and irrelevant to the issue. On the other hand appellee urged that the chancellor correctly held that the commission was in error in rejecting the testimony offered by them to show that public convenience and necessity did not require the construction of any facilities by the appellant. In discussing this issue, the commission said:

> (Here is quoted Paragraphs 23 and 24 from the Commission's Order of January 4, 1967, quoted above)

. . . .

When we analyze the situation with which the commission was confronted, we find that it properly limited the issue to the question of whether public convenience and necessity required the construction of the enlarged facilities requested in the amended application rather than the facilities authorized in its order of March 7, 1963. After we had affirmed its action in granting the certificate of public convenience and necessity to appellant to construct the authorized facilities and the Supreme Court of the United States had refused to grant certiorari, neither the commission nor anyone else could prevent appellant from constructing those facilities and delivering the electricity gen-

erated to its member associations at the authorized delivery points. So actually all the commission could legally do was to either grant or refuse to grant the amended certificate. It could not take away appellant's right to construct the facilities that it had authorized; it could not hold that by delay, appellant had abandoned its right to construct those facilities because appellant had been prevented from building them by the "stay order" granted at the appellee's request. If it had denied the petition, appellant could have proceeded to construct the authorized facilities and then applied for an amended certificate to enlarge them. The proof shows that the facilities proposed in the amended application can be constructed for far less money than it would cost to construct the original facilities and then to add to them the necessary generating units and transmission lines to properly serve the needs of the four associations with which it holds contracts to supply wholesale electricity. Under these circumstances the proof offered by appellee was not relevant to the issue and the commission properly rejected it. Neither did it unduly restrict appellee's right to cross-examine appellant's witnesses.

Appellee's contention that the facilities proposed in the amended application are new and so different as to amount to an original application is without merit. The enlarged plant is to be constructed at the same location as the plant originally authorized. Its principal difference is that it will be capable of generating more electricity. It will still be a plant for the generating of electricity. Appellant was authorized to construct certain transmission lines by the original certificate to serve its member associations at certain delivery points. The amended application sought authority to build more miles of the same type transmission lines and to deliver electricity at more delivery points, but these lines and delivery points will serve the same associations it was authorized to serve in the original application except for one delivery point at Leakesville. Though the commission found this delivery point was not included in the original certificate, it was shown

by the undisputed evidence that in the original proceeding appellant had proposed to pick up this delivery point on or about July 1, 1965, being one year after the original start-up. This point is now served by Mississippi Power Company, but the commission found that Mississippi Power Company directed no objection to the picking up of this delivery point as such. The commission found that it is an intermediate delivery point between Lucedale and Rocky Creek sub-stations in the extreme southeast portion of appellant's proposed transmission system and the State Line substation located thirty miles or more to the north, and that without this delivery point there would be no intermediate delivery point on this line. The commission found that there was sufficient evidence to establish that public convenience and necessity required and will require that this delivery point be included in appellant's overall system.

While it is true appellant had not at the time of the hearing of the amended application or at any other time generated any electricity or built any transmission lines, it held a certificate which authorized it to do so and we are of the opinion that for all practical purposes insofar as the hearing before the commission is concerned that they were in the same position as any other public utility seeking to increase its facilities to properly serve the needs of those it was authorized to serve.

(c) Cross-Examination

The refusal of the Commission to permit cross-examination of two of respondent's witnesses on certain points complained of (Petition page 8, paragraph numbered 7) also fell squarely within the category of *whether* respondent should be permitted to enter the field of generation and transmission in the state, an issue previously determined in the original proceeding and not involved on the petition to amend, as to which the State Supreme Court said (211 So. 2d at P. 829; Pet. A. 3, P. 75):

> It (the Commission) rejected the evidence offered by appellees designed to show that public convenience and necessity did not require the construction of any facilities by the appellant. It also refused to allow appellees to cross-examine appellant's witnesses *on this issue*. The Commission held that the testimony offered was immaterial to the issue before it at that time. (Emphasis added)

More detail could be given on the exact nature of the evidence sought to be elicited by cross-examination but reference to the passages of the Record cited by petitioners will bear out precisely what the Court said on the point.

VI. USAGES IN PUBLIC UTILITY REGULATION

Petitioners have not questioned the authority of the Commission upon proper application and showing to amend a Certificate of Public Convenience and Necessity previously issued by it before actual construction of the authorized facilities is commenced—whether to increase or decrease capacity or otherwise modify the facilities as the factual situation may require; and they could not well do so lest they block their own paths in such cases to which they of necessity must resort not infrequently.

It is pointed out, however, that as a matter of necessity there is an established usage in public utility regulation in this country that permits and often requires the amendment of certificates of public convenience and necessity in the public interest before or during construction of the facilities authorized to be constructed and operated under such certificates. There is particularly such a necessity in the electrical utility business where there are continuous changes and shifts in locations of electrical loads and there is an overall steady trend of increase in the use of electricity. The Commission in its order of

January 4, 1967, judicially noticed that there has been a long time trend of increase in use of electricity making system loads double every seven to ten years (Pet. A. 1, P. 40, paragraph numbered 24). Actually, the load certificated to respondent by the order of March 7, 1963, was shown by the evidence on the petition to amend to have increased during a ten year period (1954-1964) at an average rate of 12.7%; so that the load doubled every 5.8 years (R. VI, 388). This is above the average for the entire industry, which is seven to ten years (R. XVII, 1766).

The Commission made a finding concerning the necessity and usage aforesaid (Pet. A. 1, P. 38, paragraph numbered 21; R. XVII, 1762-1763, paragraph numbered 21):

> 21. It is not infrequently found to be needful and in the public interest, particularly in view of the nature of the generation and transmission business which is affected by the constantly changing and fluctuating use of electricity in various localities, and the trend toward increased use thereof generally, that certificates of public convenience and necessity be amended even before construction begins, or during construction, to meet the needs of the system. Examples of such cases may be found in this record, put there by one of the Protestants, to-wit:
>
> (a) On August 12, 1963, in Docket U-825, the Commission granted a certificate to Mississippi Power & Light Company authorizing it to construct and operate *inter alia* approximately 140 miles of extra high voltage transmission lines to be constructed for operation at 345 KV; before said lines were built and on December 14, 1964, said Mississippi Power & Light Company filed its petition in the same cause to amend said certificate to authorize modified construction so that said lines would be operated at 500 KV instead, the added capacity being indicated by subsequent engineering studies; and to accelerate the completion

date thereof, due to increases in projected loads; and on January 15, 1965, upon the bases aforesaid, the Commission granted the amendment for the modified lines with *different* and *larger components* to provide *added capacity*; and

(b) On August 12, 1963, in Docket U-826, the Commission granted a certificate to Mississippi Power & Light Company authorizing it to construct and operate a steam generating station near Vicksburg in Warren County, having a capacity of 400 MW; before said station was built, and on December 14, 1964, said Mississippi Power & Light Company filed a petition to amend in the same cause and under the same docket number seeking authority to substitute a larger generating unit and increase the capacity of the station to 500 MW, because load forecasts for its system had been revised and the increased capacity was needed in order to meet the projected requirements of its system; and on January 15, 1965, the Commission granted the amendment authorizing the *substitution* of *equipment of greater capacity* and *increasing the capacity of the said station* to 500 MW.

(The original order in Docket U-825 is Exhibit "PA 57" in the evidence, and the order amending the certificate is Exhibit "PA 58". The original order in Docket U-826 is Exhibit "PA 59" in the evidence, and the order amending the certificate is Exhibit "PA 60".) (Emphasis added)

While the usage is an obvious necessity and is general in the regulatory field no party to the proceeding in the Court below cited a single Court decision on the propriety vel non of the usage. This is no doubt because no utility ever questioned in Court the necessity or propriety of the usage. Actually, other utilities should have no interest or concern when a sister utility finds need to increase system capacity to handle its own loads (loads of other utilities not being involved or affected—as in the case here).

The State Supreme Court noted this absence of judicial precedent (Pet. A. 3, P. 80; 211 So. 2d at P. 832):

> Although counsel in their excellent and exhaustive briefs cite numerous decisions by this Court and Courts of other states, they do not cite any cases dealing with a factual situation similar to the one here, nor have we found any.

But the Court found no difficulty in approving the usage as being necessary and in all respects appropriate and proper; eight Justices concurring (one taking no part).

Thus, it is seen that the evidence offered by petitioners and excluded by the Commission was clearly irrelevant and immaterial to any issue presented by the petition to amend; and the very same is true as to the points on which cross-examination of two of respondent's witnesses was restricted.

Actually, petitioners had no interest whatever in the proceeding on the petition to amend since neither of their systems nor their loads were involved or affected in any way whatever (except for the one delivery point at Leakesville, referred to by the Commission and the State Supreme Court as shown above which represented less than 1% of respondent's load [Pet. A. 1, P. 36, paragraph numbered 17 —Commission's Order of January 4, 1967]—and concerning which as such Mississippi Power Company made no objection as is pointed out by both the Commission and the Court). Only the loads and system of respondent were involved. The Commission's Order of January 4, 1967, amending respondent's certificate took nothing from petitioners nor did it affect their interests in any way whatever.

The Commission expressly so found (Pet. A. 1, P. 43, paragraph numbered 29):

29. If the Commission should pursuant to the Petition to Amend enter an order herein amending Petitioner's certificate of March 7, 1963, it *would not take from either of the Protestants any power load* (with the single exception of the Leakesville Delivery Point which has already been dealt with hereinabove); *but would affect only the loads previously certificated to Petitioner* under the Order of March 7, 1963. (Emphasis added)

Actually, Petitioners have not challenged this finding. It is most difficult therefore to understand upon what basis they perceive that their interests have been affected—to say nothing of their "property" having been taken without due process or their having been denied equal protection of the laws.

VII. FOURTEENTH AMENDMENT DOES NOT REQUIRE ADMISSION OF IRRELEVANT EVIDENCE

Neither the due process nor equal protection clauses of the Fourteenth Amendment to the Federal Constitution require any administrative agency or court to receive irrelevant evidence. Certainly this statement requires no elaboration and it hardly calls for the citation of authority. If the amendment required receiving irrelevant evidence it would be a fountainhead of mischief and would destroy rather than safeguard the sanctity of the judicial process.

Stated differently the right to produce evidence of which a person may not be deprived is the right to produce relevant evidence.

Of the great mass of authorities sustaining the above stated proposition these are included: *United States* v. *United States Smelting, Refining and Mining Co.*, 339 U.S. 186, 94 L. Ed. 750, 50 S. Ct. 537, reh. den. 339 U.S. 972, 94 L. Ed. 1379, 70 S. Ct. 994 (1950); *National Labor Relations*

Board v. *Donnelly Garment Co.*, 330 U.S. 219, 91 L. Ed. 854, 67 S. Ct. 756 (1946); *Loesch* v. *Federal Trade Commission*, 257 F. 2d 882 (CA 4), cert. den. 3 L. Ed. 2d 112 (1958); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 143 F. 2d 488, affirmed 65 S. Ct. 821, 324 U.S. 635, 89 L. Ed. 1241 (1945); *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1931).

To briefly note more closely two of the authorities cited above:

In the case of *National Labor Relations Board* v. *Donnelly Garment Co., supra*, the Supreme Court was reviewing the circuit court's denial of a petition for enforcement of an NLRB order. In an opinion by Mr. Justice Frankfurter the Court stated that an inquiry into charges of the employer's domination of a plant union did not make relevant evidence on charges of misconduct against the complainant, the union seeking to unionize the plant. The opinion stated (91 L. Ed. at p. 867):

> The refusal of the Board [NLRB] in effect to try International [the union seeking to unionize the plant] did not impair the validity of the Board's order.
>
> Even in judicial trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence . . . Courts of appeal are less and less inclined to base error on such rulings. Administrative tribunals are given even freer scope in the application of the conventional rules of evidence.

The case of *Baldwin* v. *Iowa State Traveling Men's Association, supra*, is explicit authority for the proposition that due process does not involve the right to litigate the same question twice. In that case lack of jurisdiction of the person was the question sought to be litigated a second

time. It had been litigated in a case in the Federal District Court of the Western District of Missouri (and lost) and was sought to be litigated a second time in the U. S. District Court for the Southern District of Iowa when a proceeding was instituted there based on the judgment in the first suit.

The Supreme Court said inter alia (75 L. Ed., pp. 1246-47):

> The respondent, on the other hand, insists that to deprive it of the defense which it made in the court below, of lack of jurisdiction over it by the Missouri district court, would be to deny the due process guaranteed by the 14th Amendment; but there is involved in that doctrine no right to litigate the same question twice (Chicago L. Ins. Co. v. Cherry, 244 U.S. 25, 61 L. Ed. 966, 37 S. Ct. 492, compare York v. Texas, 137 U.S. 15, 34 L. Ed. 604, 11 S. Ct. 9).

The Supreme Court of Mississippi has clearly held that under state statutes (*Electric Power Association Act*, Chapter 184, Mississippi Laws of 1936, as amended, Section 5463, et seq., Volume 4A, Recompiled, Mississippi Code of 1942, the act under which respondent was organized and operates [Appendix 1 hereto]; and the *Public Utility Act of 1956*, Chapter 372, Mississippi Laws of 1956, Section 7716-01, et seq., Volume 6, Recompiled, Mississippi Code of 1942 [Pet. A. 6, P. 86, et seq.; Appendix 2 hereto]), the respondent was at the time of the hearing upon the petition to amend already in business in the field of generation and transmission in the state with its loads duly certificated to it; and that petitioners' proffered evidence on the question of whether the public convenience and necessity required that respondent enter that field was irrelevant to any issue presented by the petition to amend, as were the points on which cross-examination was denied (Pet. A. 3, P. 73, et seq.—State Supreme

Court's Opinion of June 10, 1968; *South Mississippi Electric Power Association* v. *Mississippi Public Service Commission, et al., supra*).

The Supreme Court of Mississippi is the court of last resort in this state (*Mississippi Constitution*, Article 6, Sections 144, 146; *Mississippi Code, Annotated*, Sections 1941-1993 [1956]). This Court will accept the interpretation of state statutes by the state court of last resort (*Albertson* v. *Millard*, 354 U.S. 242 [1953]; *United States* v. *Burnison*, 339 U.S. 87 [1950]; *Shuttlesworth* v. *Birmingham*, 86 S. Ct. 211 [1965]; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 [1961]; *Clay* v. *Sun Insurance Office*, 363 U.S. 207 [1960]; *Kingsley Corp.* v. *Regents of U. of N. Y.*, 360 U.S. 684 [1959]; and *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167 [1959]).

VIII. PETITIONERS' ARGUMENTS AND AUTHORITIES

Respondent of course agrees that the Fourteenth Amendment requires a full and fair hearing by a state administrative agency; but only upon the issues presented by the petition or application being considered—not upon extraneous and irrelevant matters.

In this part of the petition (Section ~~IV~~ VII, page 10) petitioners come out and say plainly what they implied earlier (Pet., 6), namely, that the Commission heard respondent on subjects on which it declined to hear petitioners. Such is wholly untrue. As has already been shown respondent's entire evidence was on the proposition of modifying and adding to facilities already authorized as the best, most efficient and most economical means of providing for load growth which had occurred while construction was delayed by the stay order (instead of building exactly as previously authorized and

making additions); and petitioners offered no evidence whatever on this proposition. They only offered evidence on the question of whether respondent should enter the field of generation and transmission at all, a question which had already been determined upon the basis of full hearings and was final and unappealable.

It is thus apparent that none of the authorities cited by petitioners are in point and any detailed discussion of them would serve no useful purpose. Respondent freely concedes that the due process and equal protection clauses of the Fourteenth Amendment require a full and fair hearing and equal opportunity to present evidence, etc.; but, again, this relates to issues presented by the particular application or petition and does not extend to irrelevant matters. The rule even allows certain latitude of discretion to the administrative body conducting the hearing as to the scope of the evidence and the scope of cross-examination but not even this point is involved here because petitioners offered no evidence at all on the issues presented by the petition to amend nor did the points on which they were denied cross-examination relate to any such issues.

Petitioners complain that there has been no "determination" as to whether they received a fair hearing; and they are entitled to such a determination. But the State Supreme Court has made that determination in no uncertain terms. It decided that none of the evidence offered by them was relevant to any issue presented by the petition to amend; also that none of the points on which they were denied permission to cross-examine respondent's witnesses were relevant to any such issue. How could there be a more definite determination?

It must be apparent by this time that petitioners actually had no interest whatever in the issues presented

by respondent's petition to amend. They had no more need to attend that hearing than, for example, respondent had need to attend the hearings upon Mississippi Power & Light Company's petitions to amend certificates in Dockets U-825 and U-826 to which the Commission referred in its order of January 4, 1967, quoted hereinabove; U-825 being to enlarge components and increase capacity in a transmission line and U-826 to enlarge components and provide increased capacity in a generating station—neither of which had been constructed at the time the petitions to amend were heard. Those increases in capacity involved only that company's loads (not respondent's) and respondent had no interest; by the same token respondent's petition to amend involved only its loads (not those of petitioners') and petitioners had no interest.

Inasmuch as petitioners lay great store by the case of *Georgia Power & Electric Company* v. *Decatur*, 295 U.S. 164, 79 L. Ed. 1365, brief note of that case will be taken.

Proceeding under a state statute the City of Decatur by ordinance made a paving assessment against the Railway Company for the cost of paving a street on which that company operated a streetcar track. The company took the position that it was not benefited but injured by the pavement and declined to pay the assessment. The City sued and recovered in the trial court. The State Supreme Court affirmed. The company appealed to the U. S. Supreme Court.

Under appropriate pleadings the company had asserted in the trial court that the assessment exceeded the value of all of its properties in the City, including its franchise, and offered to surrender the properties and franchise to the City without the necessity of levy and sale (which offer was refused); also offered a witness to prove that the pavement would not be a benefit but a detriment (specify-

ing details as to the nature of the detriment) but the evidence was rejected. The ground for exclusion of the proffered evidence was that since a demurrer to the bill of complaint had been overruled the proffered evidence was irrelevant and immaterial.

The U. S. Supreme Court found that under the State Court's own interpretation of the statute involved, although the power to determine benefits to the company's property was legislative in character this but placed the burden on the company to overcome the legislative presumption of benefits by showing the assessment to be an arbitrary abuse of legislative authority "because of no benefits".

The Court said (79 L. Ed. at p. 1368):

> By that construction we are bound, and in accordance with it must consider and determine the case. The construction becomes part of the statute as much as though it were found in appropriate words in its text. (citing authorities)
>
> Under the statute and ordinance thus construed, if the burden imposed is without any compensating advantage (as appellants offered to show), the arbitrary abuse of the power exercised is plain (citing authorities); the assessment amounts to confiscation. (citing authorities) And this doctrine has been fully recognized in Georgia. (citing authorities) ...
>
> Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of the court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution. (citing authorities)

As shown above, apart from the Leakesville delivery point concerning which Mississippi Power Company had opportunity to protest but did not, the order of January 4,

1967, amending respondent's certificate took nothing at all from petitioners nor impaired any of their rights. Therefore, this case avails nothing for petitioners.

Petitioners' argument that the holding of the State Supreme Court that evidence offered by them before the Commission was irrelevant was in conflict with that Court's opinion in the former appeal (on the original Certificate) is manifestly erroneous. The same argument was advanced before that Court in the instant cause and was fully answered by the Court itself (211 So. 2d at pp. 831-832) in the course of which the Court said:

> We did not attempt to define the scope of the Commission's inquiry on hearing the petition for an amended application. We certainly did not hold that the Commission should again be required to determine whether public convenience and necessity required the construction of any generating facilities by appellant. We affirmed the granting of the certificate authorizing construction of the facilities proposed in the original application and left to the determination of the Commission whether the Certificate should be amended.

It is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. Harvey Hedgepeth, one of the attorneys of record for South Mississippi Electric Power Association, a Respondent in the above-styled cause, and a member of the Bar of the Supreme Court of the United States, certify that I have this day served the foregoing brief upon Petitioners and other interested persons in the following manner: by depositing copies thereof in sealed envelopes in the United States Post Office at Jackson, Mississippi, first class postage prepaid, properly addressed to each of the attorneys of record of such parties and other interested persons, to-wit: James S. Eaton, Esquire, 2300 Fourteenth Street, Gulfport, Mississippi, Attorney for Petitioner Mississippi Power Company; Thomas H. Watkins, Esquire, Plaza Building, Jackson, Mississippi, Attorney for Petitioner Mississippi Power Company; Sherwood W. Wise, Esquire, Electric Building, Jackson, Mississippi, Attorney for Petitioner Mississippi Power & Light Company; John K. Keyes, Esquire, Collins, Mississippi, Attorney in the court below, and Donald Wadsworth Williamson, Jr., Esquire, Deposit Guaranty Bank Building, Jackson, Mississippi, Attorney of Record in this Court for Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Association, and Pearl River Valley Electric Power Association, Respondents herein; and Bennett E. Smith, Esquire, Assistant Attorney General of the State of Mississippi, State Office Building, Jackson, Mississippi, Attorney for Mississippi Public Service Commission.

This Oct. 30, 1968.

T. Harvey Hedgepeth

T. HARVEY HEDGEPETH